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THE CITIZEN OWNERSHIP OF LANDS

By Lyman Chalkley.*

§ 1. The worth of ownership of land consists in mastery over its fruits and comforts.

The State is considered to have been the original owner of all the land; and, also, to have conferred ownership upon the private person, by its grant, in the process of parcelling. By "owner" is meant one who has the mastery over the fruits and profits, comforts and conveniences of a thing; one who is in the present exercise of the power of use and enjoyment of the fruits and profits, comforts and conveniences, and of dictation of their future use and disposition to the exclusion of all others. The character of this mastery will have a different aspect, upon consideration of whether the thing is animate, fugitive, movable, liable to loss through waste, consumption and decay, on the one hand; and whether it is permanently fixed in position, not animate, movable, nor liable to loss through waste, consumption, and decay, on the other hand. In the first of these cases, mastery involves the power to determine the conditions of existence of the thing by physical restraint, and, also, to maintain and uphold the owner's freedom of will in that respect, against all other powers. In the second case, there is no call for the owner's exercising restraint over the thing. In either case, mastery over a thing involves the power of the master to conduct himself in respect of that thing according to the dictates of his own will.

Ownership has no application to anything that is not capable of affording fruits and profits, comforts and conveniences beneficial

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to man. Dominion over all things was given to Adam; but Cain formulated a special case by asserting mastery over another being of the same family of creatures; the issue in which was whether the power of mastery given to Adam extended to males of the same species; Cain contending that Abel, co-parcener with him in the blood of the same father, was of no use, comfort or convenience to him. Cain could find no use or convenience to himself in keeping Abel, and despatched him forthwith. He might find profit in keeping a male of a different species, but none in keeping a male of his own. Cain lost his case; but the judgment established and illuminated the principle. The owner keeps the milch cow confined in a stall for her own life for the sake of the milk she gives, and when she ceases to give milk, she is led to the slaughter. The boy keeps the squirrel in a cage for the diversion he affords. The miser keeps his gold for fear of its wings.

But land does not wander around and stray away, nor is it consumed; therefore, the owner is not a keeper. His mastery is asserted by holding it, not against any inherent propensity or disposition of its own, but against the exercise of dominion by another; by maintaining and defending his occupancy against all comers.

The mastery of the landowner, then, as distinguished from the mastery of the owner of other things is that he "holds." Whether the thing be such as will stray, or be consumed and lost; or will endure in time and remain in place without keeping, the essential consideration is always the fruits and profit, the comforts and conveniences to man. The worth of ownership is the worth of the usufruct. Each is the measure of the other. Mastery over the usufruct is ownership. The power of holding will naturally involve the power of taking the usufruct; and the power of taking the usufruct will naturally involve the power of holding. Holding is a means only of securing the fruits.

Under the simple conditions of primitive life, the owner will both hold, and take the usufruct. Whoever takes the usufruct must, also, hold, or he will lose the benefits which constitute the only worth. If the holding is performed by the State, that is, by organized society, ownership is reduced from mastery under the authority of God to power over the fruits and profits, comforts and conveniences, under the authority of the State.

§ 2. Possession is the state of holding under the authority of organized power.

It would be impossible that a man could acquire and exercise ownership or mastery over a thing without (1) subjecting it to his own will by physical restraint,, and (2) occupying or encompassing

it with his own power; in other words, without taking it into his actual possession. Without the possession he could not "hold it." Under primitive conditions there would be no ownership without occupation. In raw nature, where there is no association of individuals for mutual protection and support, a man cannot occupy in person any greater extent of land than he can cover with his body and reach with his limbs and weapons; his occupation will be co-extensive with his possession, or power over it. He will "possess" what he "occupies" and holds by the might of his own strong, right arm. His possession will be limited to the extent of his occupation. Without the support of a suite or company of retainers, a man can possess only so much land as he can hold; that is, maintain his will over it. Without greater force than his individual physical power to back his personal prowess, no man should expect to hold any land for long secure against intrusion by others. Thus he will possess what he can hold by the combined force of himself and his aids; a conception which was apparent to Wordsworth upon his contemplation of Rob Roy's grave. But with the aid of the union of the elements of force and power contributed by the members of his family, then of his tribe, then of an aggregation of people united into a political society or state, he can "hold" and also "possess" as much land as his society will undertake to maintain him in. For the peace of the society, he will be allowed to use his own strong right arm only in case of immediate peril; the State is the author of force and exerts as much as is required in all other cases.

Possession is thus a complex conception requiring very careful consideration of its terms. It is much wider than "occupancy." It denotes occupancy accomplished through power, not through personal presence; the range of exercise of power by the possessor will be much greater than that of his natural body. And the possessor may possess land, and yet another occupy it by his authority. It does not denote the act of bringing the thing into subjection to his will and under the shadow of his shield. That we describe by various phrases: "take possession of," "make himself master of," "possess himself of"; nor is it a quality, but only an attribute of ownership. It is a conception created by the law, and exists only in contemplation. It denotes always power, instead of the personal presence of the occupant. It carries the idea of extension of the atmosphere of the personal presence as far as his power will reach. It denotes the state or condition of any one, who having grasped or encompassed the thing, continues, through the exercise of power, to maintain his hold on it. Possession extends to all that is owned, not alone to what is occupied.

The children's song relates that "the jay-bird crept in the

wood-pecker's hole and he couldn't get him out to save his soul." The jay-bird seized the space, occupied it with his own presence, and kept the wood-pecker in a state of being out; that is, he took possession. That single performance involved three separate acts, (1) causing the hole to rest under his mastery and power; (2) causing the hole to be filled with his own body as a permanent condition of the hole; (3) causing the wood-pecker to remain out, as a permanent condition of the wood-pecker. These are respectively, (1) Entry, (2) Occupation, (3) Holding.

Until actual entry upon it, a man cannot "possess" land according to any primary conceptions; in order to possess the land, he must be in a situation to hold it physically; he is not in such a position unless he stands within its boundaries and upon its surface. The act of a man in placing himself in that situation is called "entry." There can, of course, be no "occupation" without entry. But after entry has been made and ownership established, then, by the owner's voluntary act, possession may be delivered to another, and yet the owner remain owner, by reason of two primary rights, which will remain to him: (1) That he may re-enter and re-possess himself if the other break any condition or term of the agreement between them; and (2) That the possession will not become vacant by the death of the tenant, but will "revert" to the owner of its own virtue and character. The one to whom he delivers the possession may or may not "occupy" the land; whoever has the possession may install another under him in the "occupancy" without delivering to him the possession. We speak of the lawful presence of a man on land for a fixed period of time as possession; but it is not possession in the primary or correct sense.

Thus it will be seen that one may be the "owner" and yet neither possess nor "occupy"; one may occupy without possessing or owning. The owner may have a dominion, and the possessor a dominion. As possession exists only in consequence of some ownership, one who possesses must possess under either his own or another's ownership. Possession must be by some authority ordained by law; ownership is of the eternal course of things. Occupancy is of the will of the occupant; possession is of the fiat of organized power.

The immediate control of the land follows the possession and not ownership. The owner may be the owner, because he has the right of re-entry, the right of reverter, and the right of dictation of future disposition; and yet not have the immediate possession and "hold" because he has parted with the possession. After he has conferred the physical land upon another, in the nature of things there may remain to him the ownership, but in the form of rights against the possessor. It is not inconceivable, because it is uni-

versally practiced, that he may even part with both the possession and ownership, and yet have remaining to him a right of re-entry and a possibility of reverter. In any of these cases there may still remain to him the power and duty of regulating and protecting the mode and manner of user of the land. Thus, the American state exercises the power of police, not over the land, but in regulation of the possession. The State has parted with both the possession and ownership.

§ 3. The organized power of the State may extend the ownership by descent, but not the possession.

As an original conception, the ownership will endure in time as long as the owner can hold the occupancy by force; the farthest extent of which will be his own life. Unless there is some organized power which survives him and continues his ownership, it will lapse, and the land be open to another occupant. If there is such a power, the ownership may be continued under its authority; but both ownership and possession can exist only as an investment of some person. It follows that both ownership and possession are conceptions dependent upon organized power; ownership enduring as long as the power prescribes, and possession for the life of the possessor. There cannot be but one ownership, but it will endure through a succession of lives, one after the other. There cannot be but one possession, and it will cease upon the death of the possessor. The next possessor must receive the possession by a new investiture. The conception, "possession," exists only as the gift of a superior power, and possession is always necessarily under that power.

The power which supports and maintains the possession will naturally provide a rule to determine the person in whom the ownership shall be vested after the death of the person who last died owner. While the possession resides with the ownership, yet, as has been seen, the owner may let the possession out for a time to another. If that other should die during the lifetime of the owner who let him the possession, the possession will revert to the latter, who has never ceased to be owner. If the owner should die while the possession is out, then the possessor would have, immediately, an absolute possession equivalent to ownership unless the ownership traveled along a clearly marked line of succession of persons without a new investiture with each successor. This quality of ownership of land is found among all peoples as practically a primary notion. Naturally the persons who will succeed to the ownership will be the members of the household of the owner who are about him at the time of his death. The earliest practice did not confine

the succession to blood kin of the owner, but extended to the members of the group. "And Abraham said, Lord God, what wilt thou give me, seeing I go childless, and the steward of my house is this Eliezer of Damascus? And Abraham said, Behold, to me thou hast given no seed; and lo, one born in my house is my heir. And, behold, the word of the Lord came unto him, saying: This shall not be thine heir; but he that shall come forth out of thine own bowels shall be thine heir." Through the operation of this principle, the ownership will not lapse or suffer interruption as long as there is a person designated heir to succeed.

§ 4. The inheritance has the four attributes, (1) Rent, (2) Re-entry, (3) Reverter, (4) Descent.

That quality of ownership in accordance with which it does not cease upon the death of a particular owner, but continues through an indefinite succession of persons is called The Inheritance. When the owner lets out the possession for a time there remains to him, as has been seen, a residue of complete ownership, which residue consists of four particulars, (1) the right to receive the service or render or return to be made by the possessor; (2) the right to re-enter for a breach of condition by the possessor; (3) that upon the completion of the period of time designated for the endurance of the possession, it will revert to the owner; (4) that upon the death of the owner, the ownership will descend to his heir. These four characteristics of ownership are called (1) The Service or Rent; (2) Right of Re-entry; (3) Reverter; (5) Descent.

It is to be carefully noted that the heir receives his predecessor's ownership, not a new ownership. The heir's ownership is the extension of that of the ancestor. The heir will have the same identical right; that is, he will have the rent, the right of re-entry, the reverter and the inheritance; he will have the right to receive the rent, and the power to re-enter where his ancestor could have re-entered; there will be a reverter to him where there would have been a reverter to the ancestor, and there will be a descent to his heirs, being heirs of his ancestor.

Possession for a time may be severed from the ownership; of the residue of the ownership, called the Reversion, the rent, the right of re-entry and the reverter will be incidents of the inheritance; that is, they will run with the inheritance and appertain to the owner of the inheritance. When the owner has let the possession for a time to one, he may also dispose of the inheritance to another. When this is done, the owner divests himself of his entire ownership and nothing remains to him. The possession carries the physical occupancy and holding, and the usufruct; the inheritance carries the

rent, the reverter, and the determination of the course of descent and the right to re-enter. He cannot sell his land and have it, too. There seems to be no good reason, in the nature of things, why the owner may not dispose of the inheritance and retain the possession. Which will, of course, be limited to his lifetime.

§ 5. In America, citizen or alodial ownership has been substituted for feudal holding.

From what has been said in the preceding paragraphs, it will be apparent that there may be two dominions over the same piece of land at the same time: (1) the dominion of ownership, and (2) the dominion of possession or usufruct. The first harks back to God as its author and warrantor; the author of the second is the organized power of the State. These have received the names of *Dominium Directum*, and *Dominium Utile*. They may be called General Ownership and Possessory Ownership. Coke says: "The estate of the king is direct ownership of which God alone is the author." *Dominium Directum* is defined in a modern dictionary as "the ownership left in the superior lord as distinguished from the *dominium utile*, the possessory right granted to the vassal." Possessory ownership is secondary and subordinate to general ownership. There will be necessarily some relation resulting between the general owner and the possessory owner. As the inheritance is a constant factor in all cases, together with its incidents, re-entry and reverter, the relation in a particular case will necessarily involve the return, render or rent, and such other services and terms of holding under authority of the general owner as may be agreed between the parties. In usage and practice in the past, the terms and services of holding have fallen into two classes: (1) fealty, or personal allegiance to the general owner, in all that concerns his welfare and maintenance; together with the render of some form of valuable service; (2) the render of some form of valuable service, alone. Which of these modes will apply in a particular case will depend upon the special theory of holding in force in the particular jurisdiction. In the American States three special theories and practices of holding must be considered in order to determine the nature of the theory obtaining in the particular state. The first of these is the feudal practice in its original and simple form; the second is the common law practice and custom evolved out of the feudal, and in use at the time of the Revolution; the third is the alodial theory introduced into practice in all the States since the Revolution. These three are so involved and intermingled in legal thought, expression and terminology, that it is impossible to say that there is any determinate, settled practice anywhere. But the student is to be advised that the courts have

gotten, in the main, very far away, indeed, from the overwhelming influence of feudal principles which characterized the earliest American decisions. The early view is authoritatively expressed by Justice Sharswood in these words: "The principles of the feudal system, in truth, underlie all the doctrines of the common law in regard to real estate, and wherever that law is recognized, recourse must be had to feudal principles to understand and carry out the common law." In *Lyle vs. Richards*, 9 S. & R. 333, Chief Justice Tilghman said: "The principles of the feudal system are so interwoven with our jurisprudence that there is no removing them without destroying the whole texture." In *McCall vs. Neeley*, 3 Watts 71, Chief Justice Gibson said: "Yet feudal tenures may be said to exist among us in their consequences, and the qualities which they originally imparted to estates; as for instance, in precluding every limitation founded upon an abeyance of a fee." These citations show the bias of the early judicial mind towards adhering to feudal principles. It may be safely said that at present the current of opinion is strong against the feudal doctrines in the courts; that many of them have been abrogated or modified by statute, and that the present establishment is almost purely alodial, both in principle and in practice.

§ 6. The feudal lord paramount exercised the function of administration, and owned a very valuable franchise.

Although the feudal doctrines have lost their force as binding principles, both in England and America, yet, in the matter of the general and possessory forms of ownership, and their numerous variations, those same doctrines and practices are the standards and furnish the analogies by which the sufficiency and validity of a particular interest in land are to be tested; and it is impossible to come to a reliable conclusion as to any matter respecting estates in land without running down the doctrine from the feudal system and through the common law, as well as through the American decisions and statutes.

Under the feudal theory and practice, rights of enjoyment over a particular parcel of land were to be traced through the following succession of relationships. The king was the sole "owner," his was the dominium directum; it would never pass out of his sovereign prerogative. He conferred the "possession" upon the knight with very large and intricate, almost unlimited, powers of dealing with it. By way of return for the privileges and immunities, conferred upon him, the knight undertook fealty to the king, and the performance of acts of valuable service in his support and maintenance. Among the powers over the land conferred

upon him was that of "holding" the land under the warrant and authority of the king; and also that of investing others with the possession, to hold under his warrant and authority, in a relation of dependence and inferiority, similar to that between the knight and the king. This investiture of inferiors took three forms: (1) When the knight transferred the possession of the whole of his feud together with the identical privileges and immunities which he enjoyed. This he could do only with the consent of the king, and was in all respects an assignment. (2) When he transferred the possession of the whole of his feud, but with different privileges and immunities. This he was allowed to do, since such an interest would be less than what he enjoyed; and consequently his transferee would hold under his warrant and authority and not be substituted in his place. (3) (a.) When he transferred part of his feud with the entire sum of privileges and immunities, as applied to that part. This he might do since the transferee would hold of him and not be substituted in his place. (b) When he transferred part of his feud, but with different privileges and immunities. This he might do, since his transferee's interest would be inferior to his, and the transferee would hold of him and not be substituted in his place. As the knight was a soldier, and his only capacity as well as duty was to perform military service, it is readily seen that what the king conferred upon him was the very valuable franchise of dealing with the land in a way to support himself, and to enable him to furnish his quota of soldiers upon the call of the king. Thus, on the one hand, the king secured a military retainer, who would also incidentally furnish pecuniary assistance upon occasion; and the knight secured a very valuable franchise, together with social and political privileges and immunities generally considered to be of still greater value. The person upon whom the knight conferred the possession to "hold of" him was called "vassal." The knight's feudal designation was Lord Paramount. In many instances in the American Colonies he was called Lord Proprietor. He did not sell his lands, but farmed them out; he remained always proprietor.

After the investiture of the knight by the king, the relation resulted consisting of (1) fealty to the person of the king; (2) the king's right to receive the render and service agreed upon; (3) the king's sovereign power to re-enter for condition broken; and (4) the reverter of the possession to the king, if the descent from the knight should become extinct. If the king re-entered for condition broken, or there was a reverter to him because of failure of heirs, all grants made by the knight determined, and the king received the land back without any incumbrances. On the other hand, the knight "held of" the king; by which is meant that he "held" by

the warrant and authority "of" the king; that is, he was authorized to vouch and call upon the king as his friend and powerful patron.

It is to be noted with considerable emphasis that the knight might create and confer upon his vassal both the possession and the inheritance, but for a limited duration in time only, or upon a condition. In both these cases, notwithstanding he had parted with the inheritance, the knight still enjoyed an "interest" or "estate" in the land; for he was still entitled to the privileges and immunities of a landholder; he had still the right to receive the valuable services from his vassal; he had the reverter and right of re-entry; and he had, further, the right to receive the land back upon the extinction of the vassal's descent, by escheat. Thus, the knight had an interest or estate in the land which arose out of his relation as landholder under the king, but did not inhere in the land itself. His was a separate and independent interest; was an independent species of real property, and descended to his heirs, just as the right of possession and the usufruct descended to the vassal's heirs, if his interest was one of inheritance.

§ 7. The vassal's was a particular interest, carved out of the general interest of the lord paramount.

When the knight conferred the possession and usufruct upon the vassal, the relation resulting between these two was essentially the same as that between the king and the knight, with some exceptions to be very carefully noted. The holding conferred upon the knight was absolute; that is, it endured in time as long as the knight had heirs and it was free from conditions, except fealty and service. In legal contemplation, no man can die without heirs, and consequently, it was considered that the knight's "interest" would endure in time forever. But when the knight conferred the possession and an interest on the vassal, the gift might be either for a modified inheritance, or for a period of time measured by the life of a human being in existence at the time of the gift; it could not be for any form of descent other than that prescribed in the canons of descent; and it could not be measured to determine upon the happening of an event the time of whose occurrence was known or could be ascertained. It was necessary that the "interest" conferred upon the vassal should be less than that invested in the knight; since the scheme of military and political organization required that there should be a relation of fealty and service existing between the knight and his vassal, in all respects similar in effect to that between the knight and the king. Any such limited interest, less than the knight's interest, was known, and is still known, as a "particular" interest; as being a part or bit carved

out of the whole and entire interest of the knight. If this "particular" interest was one which was without the inheritance quality, then, during its continuance, the knight had a vested "interest" in the land, which was and still is called "the Reversion." This reversion would pass down the line of the knight's descendants by inheritance; and it could be assigned by the knight to another. The assignment of the reversion carried with it the "inheritance."

The vassal might or might not occupy the land in person; if he did not, he could assign his interest; or he could let the land to another for that other's lifetime; or he could let it to another for a definite period of time. The last resulted in a relationship based upon contract or servility, which were relations inconsistent with the relation of landholder; wherefore there was no transfer of the possession to the contract or slave tenant, and it remained, accordingly, with the vassal. Consequently, these last interests did not constitute real property, but were only personal property and are such today.

Thus there were always three and generally four persons having at the same time, each a separate and distinct interest in the same identical piece of land or feud. Each of these several interests was called, and is still called, an "estate." The king's estate was that of "direct ownership," and it never passed out of his prerogative as sovereign lord. Although the office and prerogative of king never ceases, yet the person will die; and the fealty which the knight swore was personal to the individual then king. Upon the succession of a new king, the knight must swear allegiance anew; and upon his rendering fealty to the new person, the knight's original interest continued. The benefits which the king received were fealty and service; the reverter and re-entry; and patronage. The knight was entitled to the privileges and immunities of his caste; and other valuable returns and rights which have been fully set out above. Neither the king nor the knight had the possession; that was with the vassal; who, in turn, had the privileges and immunities of his caste, and other privileges and powers similar to those of the knight. If the vassal did not occupy the land in person, he let it to the occupancy of another who was his contract or servile tenant, one who had no interest in the land, whatever, but only a personal right against the vassal arising out of contract or servility.

§ 8. The feudal system was a compactly articulated economic, political, and social organism, whose vital spirit was the king's prerogative ownership of the source of supply of the necessities of life.

The feudal system had as its object the building and conserving of a political and social organization in support of the king's prerogative as sovereign lord by rendering every person either mediately or immediately dependent upon him through economic control. This was accomplished by treating land as the ultimate source of sustenance, and assigning to each man a place, condition, status, or estate, which was both political and social and varied with the character of his relation to some part of the public domain of land. By this scheme of organization the only persons who were citizens and had any degree of political liberty were those who had an interest of present or future enjoyment of the possession of a parcel of land, or feud. These were knitted together into a compact organization, the bond being the support of the king. Fealty to the person of the king was essential to political and civil liberty. The spirit of the organization was allegiance to the same individual; there was no conception of the common welfare as established in America. The common welfare was embodied, it began and ended in the welfare of the king. This organization was the political society which constituted the State; but the conception of a State was a far different idea then from what it is now. Under that system the entire source of sustenance was pooled and divided into holdings. The franchise of administering these holdings was conferred upon individuals, to each a holding. These individuals formed a very powerful caste or class. In general, the terms of holding were the same, except that the services to be rendered varied. These had the common character that they were military. These feud holders were in immediate relation with the king, but in no immediate relation with each other. There was no bond that bound them together, except that they were severally bound to support the king. They enjoyed, however, certain social and political privileges and immunities, participation in which raised something of an obligation to support the order against all who were not members of the caste. Each of these immediate supporters of the king administered his parcel or feud independently of the others, but so as that he collected under him and bound to his person by fealty a body of supporters who were in immediate relation with himself and thus, mediately, with the king. The body of the supporters of the same lord were bound to each other only mediately; that is, through their lord. The whole body of the supporters of the lords, being two degrees removed from the king,

formed, also, a caste or class having certain social and political privileges and immunities, community of interest in which bound them together in some fashion. Thus the scheme was to build up a compact organization the members of which were divided into classes of graded superiority and inferiority and knitted together by the common bond of economic dependence upon the king, who had a monopoly of the land. Every man was inferior and dependent upon a superior politically, socially and economically. The bond between the superior and inferior was that of fealty and service by the inferior in return for the possession of the superior's land.

§ 9. Free citizenship and citizen ownership have taken the place of the articulated organism built upon prerogative.

As a scientific establishment, the feudal system was perfect, and it suffered the fate of all perfection, disintegration. No sooner was it inaugurated than it became the object of attack from all sides; the subtlety and finesse of the Norman ecclesiastic and lawyer; the political and social intrigue and jealousy of the lords, struggling to preserve their wealth and political control; but above all, though not so obtrusive, the innate sense and spirit of liberty which characterized the substrata, who were eternally pushing upwards with all the silent force and increasing surge of the growing oak, or of the Messianic Hope. Out of it all, through five hundred years, was evolved the structure of the common law which was brought to America by the colonists: During the two hundred and seventy years of the English colonies, a new shoot was put out from the old stock, which, seven hundred years after the imposition of the original stem, became itself the organism of the alodial system of land holding of the American States. At the time of the Revolution, little remained of the feudal establishment except an extremely complicated system of "Estates." Some remains of the privileges and immunities of the castes obtained in the colonial days, and to some extent in the States after the Revolution. It may be that in some sections at the present time, only "free-holders" may serve as grand jurors, and justices of the county court. But the social and political privileges which were features of the ownership of a freeholder have passed away in all other particulars. The political upheaval of the Revolutionary period was a social upheaval as well. The class system was broken down and equality among citizens was established in its stead. Participation in government is not dependent upon land ownership. The monopoly of land in prerogative has been repudiated. No one is the superior of another through land proprietorship. The

great power and peculiar privileges of the lord paramount have been abolished. The personal relation of fealty between lord and vassal never obtained in America. The entire structure of a State composed of landholders has fallen. In its place has arisen a community of human beings, who are self-determining and whose political and social relations are directly with each other; and there are no privileged classes recognized by law. This was accomplished in the main by striking at the apex; by destroying the supreme sovereign ownership and monopoly of land, and the franchise of the lord paramount. The relation of the State is now only with the land, and not the owner. Through the police power alone does the State exercise any control over the owner. But the doctrines of possession, holding, occupancy, reverter, re-entry, inheritance, and "estates" survive.

§ 10. The American State has only the rights of sovereignty against the land; personal allegiance of the owner is abolished.

When, during the period of 1775-1800, the inhabitants of the territories which had been the colonial possessions settled the form and organized the agencies of government, they did not erect a system of land administration having none of the features of that to which they were accustomed. On the contrary, they did not go far afield from perpetuating by express recognition and establishment as legal practices those customs which had been used among them for many years. They established a liberty of action in the form of a mutual convention or constitution, which embodied their tried experience and achievement, with some theories which, it was believed, would add to their plan. The doctrines and theories of the feudal holding found no place in their scheme; these had been in fact overthrown already, although they retained some influence through the forms which remained. In the matter of the regulation of right of property in land, they were extremely conservative; they proceeded not by rooting up everything that existed, but by accommodating the then existing practices to the changed political and social establishment. By abolishing the office and power of king and of lord proprietor, they released that direct ownership of land which the king had held under the authority of God alone. That direct ownership the king had organized according to a highly specialized system of sub-holdings and vice regal tenancies for the peace and protection of the kingdom, and the perpetuation of his own power. In the process, he elevated some individuals and conferred upon them exclusive privileges and immunities; others he reduced to slavery and deprived of all civil and political standing. This was carried into effect through the force of obli-

gations, enforceable by him not through direct control of the land, but through a personal relation between him and his tenants. The feudatory had the land, but the feudatory and not the land furnished support to the king. The king farmed out the land and took the personal security of the feudatory. In the change from the old to the new dispensation, the direct ownership of land was reposed in the State; but the artificial system under which that ownership was organized and administered was destroyed root and branch. The structure which was erected by the fathers of the constitution was not built upon the cornerstone of land holding; citizenship was substituted. Holding was taken over by the State. The military feature of a standing army was forbidden. The special relation which had existed between the citizen and the State growing out of land holding was abrogated. Land became the subject of common and customary property right in all respects as personalty. The State's relation was established as general, not special, with the land as a part of the public domain; not personal with the citizen as its tenant. Those sovereign powers over the land which were not a part of the feudal system were retained; that is, the war power, taxation, eminent domain and ultimate succession. The only personal relation which the State has with the citizen-owner is that which grows out of the duty of "holding"; that is, the regulative and protective function which we call the police power. Forfeitures for breach of allegiance were abolished. The citizen owner was given no power to administer his land for the purpose of establishing a petty kingdom under his own rule. Escheat was abolished; the ultimate succession in the State substituted. This citizen owner was forbidden to install another to hold under him by personal allegiance, or fealty. The only allegiance provided for was to the State. The duties of citizenship and the relation of contract took the place of the relation of lord and vassal. The certain render of a composition in the way of taxes enforceable against the land was substituted for the uncertain calls of the feudal burdens demandable of the owner. Only one holding was recognized, and that was to be absolute, constant, customary, and free, and not subject to legislative interference. The citizen-owner cannot transfer his holding, and yet retain a hold on the land or on the transferee; the transferor is deprived of all power of ownership, however remote. The only vestiges that can remain to him are the right of re-entry for condition broken, and the possibility of a reverter; neither of which is an interest in the land, or an element of ownership.

§ 11. Citizen ownership is a conception existing only in the limitations of American law.

That ownership which the American State exercises under the authority of the grace of God and the fiat of the inhabitants it has organized under no logically articulated system at all. It has created no new organism, but has imposed itself as the head of such a system as might be deduced from the customary usages practiced at the time of the Revolution, modified by such constitutional enactments as were formulated during that period. Its function was, not to overturn the existing scheme of property right in land, but to introduce settlers to their places and clothe them with the possession to hold under its sovereignty. The only terms of holding specified are those imported in the words of its grant, "to have and to hold to him, the said A B and his heirs and assigns forever." By common understanding everywhere, and by express enactment in some places, the interest conferred by the State is that of "Alodial Ownership"; that is, exclusive of the superior and intermediate right of any other private person interposed between the owner and the State. The general characters and powers of alodial ownership have been already detailed incidentally in the preceding pages; its powers and particular characteristics as practiced in the American States are not certainly and definitely established. The most frequent expression is that the donee of the State is "owner," and that the State has conferred upon him the "ownership." It seems to be reasonably settled that the State's grant is not a sale, since the only person to whom the State could transfer its sovereignty would be another sovereign. The only possible donee of the State is its inferior. The ownership, then, conferred by the State, is not one that can be asserted against itself, but must be held in subjection to its authority. Its custodianship for the public benefit, that it may be retained and conserved as a permanent refuge and domicile for the body politic, cannot be transferred. While the grantee becomes owner, yet, as compared with the direct ownership by the authority of God alone, he is owner only *sub modo*; that is, qualifiedly or with limitations. He acquires an ownership which inherently imports the possession; which is subject to the necessities of the political society which confers it; and subject, also, to the same society's sovereign power and obligation to regulate the extent, the modes and manner of user and enjoyment. This ownership has an existence only in the contemplation of the American law, and then only in legal definition. It has no absolute existence, but only in its limitations. In other words, the State guarantees to the private landowner a liberty of action in dealing with his parcel which consists in a group of specific powers;

the boundaries of which are laid down only in common intendment; and are to be discovered only in the maxims and customs of the people as they existed at the period of the Revolution, or have been modified by constitutional enactment since that time. It is an abstract conception, not capable of variations; it is conferred in pursuance of general laws controlling the State authority; its properties are fixed, and cannot be qualified by terms and conditions of special grant; it is "free," that is, not "villein"; and it is "common," that is, of certain and universal custom.

§ 12. The State sets aside to the citizen owner a parcel of the public domain, and holds it to his use.

The alodial ownership of the citizen owner is to be properly regarded as the ultimate and entire private property right in land. It is the Mother Earth out of whose body and elements all interests are formed. It may be described as that particular form of mastery or dominion over physical objects which the law prescribes in respect of land, as the law of the relation of State and landowner. Its limits are not to be found in the statutes; this part of the law has never been reduced to a code; and it is submitted that in the American States, the power of the legislature extends only to its regulation and protection. The principles are part of the unwritten constitution, and, as such, cannot be taken away by anything less than a change by express declaration of the people themselves upon due deliberation. Each of the fundamental principles is a vested right of property as opposed to a mere police regulation. Its qualities and powers and their forms and doctrines were vested in the donee when the State installed the first private owner to possess according to the custom of the country. Such grants as were made before the Revolution have been brought into conformity with the standard then fixed, and all subsequent grants have been uniform. The State undertakes and engages to appropriate, devote, keep back and forever defend, that is, to "hold," the particular parcel to the uses and possessory right of the donee and his heirs and assigns forever. It would be apparent without statement that ownership cannot be conferred upon one who has not taken the possession at the time of the donation. That ownership of land in any form can be taken over by one who has not the physical dominion over the object at the time is unthinkable. It is true that a right to enter and take the physical dominion may be acquired; but such a right would not invest the donee with proprietorship, with all its responsibilities, and its privileges and advantages. The loss or absence of the specific, identical thing could be compensated for in damages. If such were the case, landowner-

ship would become the subject of dealing in futures on the curbstone. So that possession is antecedent to ownership, and a condition precedent. Under the land laws of the Federal Government, the patentee must not only be in the possession at the time of the patent, but also in the occupancy. The State systems require some sort of physical improvement of the soil. The donee or patentee thus constituted owner has a limited privilege of "holding" by the power of his own arms and those of his own servants; certainly against one who is in the act of intruding upon him suddenly and by force. This power of holding the State vindicates by extending over the owner immunity from answerability for the injury he may cause in defense. The State performs the function of holder under all other circumstances; either by the exercise of force in a proper case, or by restoring to possession the person disseised, by process from a court.

§ 13. Inheritance as a quality of the estate has been substituted for inheritance as a privilege of blood.

Furthermore, the State does not divest itself of all connection with the land when it makes a grant of a parcel to a private person. On the contrary, the State's custodianship and sovereign powers run with the land upon terms which may be asserted against the owner, whoever he may be; not alone against the State's immediate grantee or donee, or his heirs. The quality and extent of the donee's ownership are measured by the calls of that connection; and the same limitations upon direct or absolute ownership follow the land as qualifications or modifications of right or estate into whose hands the land may come, or by whatever title. The feudal "Estate" could never pass out of the donee or the line of his descendants; it could not be transferred except by a proceeding to which the lord was a party, and amounted to his acceptance of the new tenant; and if the donee's line of descent became extinct, the land was freed from the interest by the entry of the lord, or continued in another by his acquiescence amounting to a new investiture. Under the alodial system, the donee of the state may confer the possession and transfer his interest or estate to another without any special permission or license of the State; that is conferred by general provision of the law. Moreover, upon the death of an owner without heirs, there is no escheat to the State's donee or his heirs, but a succession to the State itself.

Under the early feudal law, the inheritance was personal to the donee; that is, it was limited to the blood kin of that individual within the canons of descent. The conferring upon the knight of the inheritance was the gift of a benefit to be confined

to the enjoyment of himself and his descending blood-line. His interest did not die with his person, but with the extinction of his inheritable blood. It did not run with the land, but with the blood. In the early days, the knight could not confer the possession upon another, and at the same time invest him with either the benefit of the enjoyment throughout the period of existence of descendants of the knight; or throughout the period of the continuance of descent from the donee. Thus the greatest period of time for which the possession might be conveyed was the life of the donee. He could not convey his own inheritance, because the succession could not be diverted from his own heirs. He had no authority to confer the inheritable quality upon another's blood. The second of these doctrines still remains in the form of the maxim that no landholder can create any new inheritance. As has been seen, the inheritance is a constant character of the interest or estate and is fixed by the custom. The first of these doctrines has also remained intact, namely, that the owner cannot confer upon another the inheritance to endure in the donee's blood as long as the owner has heirs. But the owner has the power to transmit to the donee an interest which will descend along the blood line of the donee or of any of his assignees. The effect of the Statute *Quia Emptores* in this particular was to convert the inheritance from a privilege of blood into a quality of interest or estate which runs with the land for the owner, whoever he might be. The interest itself determines when the person who last dies owner leaves no heirs according to the canons of descent.

A further effect of the Statute *Quia Emptores* is that it is proper, perhaps indispensable, to add the words "and assigns" to the word "heirs," in order to convey the entire interest—"to have and to hold unto the said A B and his heirs and assigns forever." Without the words "and assigns" it would not be impossible to conceive that a grantor intended to reserve the inheritable quality to his own blood, and not confer it upon that of the grantee. Blackstone says, Book II, 289: "But by degrees this feudal severity is worn off; and experience hath shown that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained. The road was cleared in the first place by a law of King Henry the First, which allowed a man to sell and dispose of lands which he himself had purchased; for over these he was thought to have a more extensive power than over what had been transmitted to him in a course of descent, from his ancestors; a doctrine which is countenanced by the feudal constitutions themselves; but he was not allowed to sell the whole of his own acquisitions, so as totally to disinherit his children, any more than he was at liberty to aliene

his paternal estate. Afterwards a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his assigns by name; but, if his assigns were not specified in the purchase deed, he was not empowered to aliene; and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir."

§ 14. The State confers only one form of ownership, which is general and uniform, and consists in defined powers.

No complete enumeration of the qualities and incidents which attach to alodial ownership has been made; nor of the specific powers which may be exercised by the alodial owner. The following lists, it is believed, include them all, either by specific mention or by reasonable import. But no basis of classification has ever been laid down by any of the writers; and the complexity of the conception seems to preclude the possibility of drawing up anything more than a tentative arrangement, such as that which follows:

I. Qualities and Incidents:

1. It is designated by the words "and his heirs and assigns forever."
2. It descends to heirs indefinitely.
3. It may be forfeited for crime.
4. It is liable for debt.
5. It is a privilege of citizens only.
6. It succeeds to the State upon defect of inheritable blood.

II. Specific Powers:

1. To have and to hold; which is the exercise of possession, and includes the right to re-enter by writ of unlawful entry and detainer, or by action.
2. To take and enjoy the fruits and the comforts and conveniences.
3. To alienate it freely by grant or devise.
4. To sub-divide the land, and convey parcels.
5. To encumber the possession with mortgages and liens.
6. To encumber the land with easements and servitudes.
7. To limit the user and enjoyment by special covenants running with the land.
8. To originate and confer upon others particular forms of interests and estates.

In general, it may be said that the alodial ownership of the citizen owner is limited in quantity, but absolute in quality; and that its form and content of terms are constant; that is, the State can and does confer only one mode of ownership, and that is of a rigidly stereotyped formula.

LYMAN CHALKLEY.